

CENTRAL VALLEY

WTA 400

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April 22, 2005

VIA FACSIMILE AND REGULAR MAIL

Mr. David Lewis  
Bureau of Reclamation  
2800 Cottage Way, MP-730  
Sacramento, CA 95825

Re: Comments Regarding Municipal and Industrial Water Shortage Policy,  
Draft Environmental Assessment and Finding of No Significant Impact

Dear Mr. Lewis:

Westlands Water District ("Westlands"), on behalf of its landowners and water users, submits these comments on the Draft Environmental Assessment for the Municipal and Industrial Water Shortage Policy for the Central Valley Project, dated March, 2005 ("Draft M&I EA").

Westlands is a California water district with contractual rights to more than 1,150,000 acre-feet of Central Valley Project ("CVP") water from the United States Bureau of Reclamation ("Reclamation"). Westlands provides water for the irrigation of approximately 574,000 acres on the west side of the San Joaquin Valley, in Fresno and Kings counties, and maintains the authority to protect, on behalf of its landowners and water users, rights that may be of common benefit to lands within Westlands. The Draft M&I EA reviews the potential impacts of formally adopting a water shortage policy for municipal and industrial water use ("M&I Shortage Policy"). Westlands, as an agricultural water contractor, will be subject to shortages as a result of the implementation of the M&I Shortage Policy. Accordingly, it maintains a vital interest in the Draft M&I EA.

By submitting this comment letter, Westlands is not objecting to Reclamation operating in accordance with a municipal and industrial shortage policy. Instead, Westlands submits this comment letter because of concerns it has with the manner in which the alternatives are described and impacts are presented. For example, it was difficult for Westlands to appreciate the differences in potential impacts that may be realized from a change from the existing M&I Shortage Policy to any of the action alternatives considered in the EA. Westlands hopes that by submitted this letter, Reclamation will revise the environmental assessment, and the resulting document will better present the information for review by the public and the decision-makers.

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The National Environmental Policy Act ("NEPA") requires that federal agencies undertake an environmental analysis for every "major Federal action." 42 U.S.C § 4332; 40 C.F.R. § 1508.18. Although NEPA is a procedural statute, *City of Davis v. Coleman*, 521 F.2d 661, 670 (9th Cir. 1975), compliance with its mandates serves an important public purpose. This requirement ensures that federal agencies are informed of environmental consequences before making decisions. *Inland Empire Public Lands Council v. United States Forest Service*, 88 F.3d 754, 758 (9th Cir. 1996). Since proper NEPA procedures may not have been followed, the potential impacts of the M&I Shortage Policy may be underestimated. Therefore, Reclamation should reconsider its analysis.

#### A. The Description Of The Environmental Baseline Is Confusing.

A legally sufficient environmental assessment completed pursuant to NEPA must include an adequate description of the existing environment. In fact, "[t]he concept of a baseline against which to compare predictions of the effects of the proposed action and reasonable alternatives is critical to the NEPA process." Council on Environmental Quality, *Considering Cumulative Effects under the National Environmental Policy Act*, p. 41, <http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm> (visited April 14, 2005). As the case law explains:

'NEPA clearly requires that consideration of environmental impacts of proposed projects take place *before*' [a final decision] is made.' (cite omit.) (emphasis in original). Once a project begins, the 'pre-project environment' becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible. (cite omit).

*Half Moon Bay Fishermans' Association v. Carlucci*, 857 F.2d 505, 510 (9<sup>th</sup> Cir. 1988).

When undertaking its analysis, the agency must be cognizant of the fact that the environmental baseline is not necessarily the same as the No Action Alternative. The baseline is a description of the affected environment at a fixed point in time, at some point prior to the approval of the project. Conversely, the No Action Alternative describes the future environmental conditions that would exist if the proposed action was not taken, thus it may include some forecasting. The No Action Alternative may assume that other things may happen even if the proposed project is not adopted.

#### 1. The Baseline May Be Improperly Defined.

The Draft M&I EA is ambiguous. There is no explanation of the difference between the baseline, the No Action Alternative and Alternative 1A. Draft M&I EA at pp. 3-8, 3-9. The environmental baseline, which is apparently encompassed by the No Action Alternative, is

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defined as project operations as they are described in the 2004 Long-Term CVP-Operating Criteria and Plan ("CVP-OCAP"). *Id.* at p. 3-8. However, the 2004 CVP-OCAP includes a Municipal and Industrial Shortage Policy ("M&I Shortage Policy") that appears identical to Alternative 1A. CVP-OCAP, June 30, 2004, at pp. 2-1 to 2-2.

The Draft M&I EA should have also clearly described the existing environment and compared that environmental condition to the changed environment resulting from the implementation of each alternative. The No Action Alternative makes a forecast about the water supply in the future, which is permissible. Draft EA at p. 3-26, Table 3-8. However, there is no parallel analysis of the water supply under the existing affected environment, as it exists prior to the formal adoption of an M&I Shortage Policy. Each alternative should have been compared to the environment as it exists prior to approval of the project and to the environment as it would exist in the future if the current project operations were continued. As a result, the impacts of the M&I shortage Policy may be improperly minimized.

Finally, the accuracy of the analysis may be questioned because, when the No Action Alternative and Alternative 1A are compared, the impacts are not identical, even though there is no discernable difference in the descriptions of the respective alternatives in the EA. *See* Draft M&I EA at p. 5-44.

#### **B. The Scope Of The Alternatives May Be Limited.**

To comply with NEPA, Reclamation must rigorously explore all reasonable alternatives, including the No Action Alternative, in a comparative form, sharply contrasting the issues and providing a clear basis for choice by decision makers and the public. *See* 40 C.F.R. §§ 1502.1, 1502.14(a), (b) and (d); 42 USC §§ 4332(a)(C)(iii) and E. The Draft M&I EA may not meet this standard.

In the case of the Draft M&I EA, the problem is with the description of the No Action Alternative and Alternative 1A. As explained above, there is no discernable difference between these alternatives. Draft M&I EA at pp. 3-8, 3-9. For this reason, Reclamation should reconsider its definitions of the No Action Alternative and Alternative 1A in order to ensure that a reasonable range of alternatives is examined.

#### **C. The M&I Policy's Potential Impacts May Be Disguised.**

Reclamation must consider the direct, indirect, and cumulative effects of the M&I Shortage Policy. According to the Council on Environmental Quality ("CEQ") NEPA Regulations, direct effects are caused by the action and occur at the same time and place as the action, 40 C.F.R. § 1508.8(a), while indirect effects "occur later in time or farther removed from distance, but are still reasonably foreseeable." 40 C.F.R. § 1508(b). Indirect effects, for example, may include growth inducing effects and other effects related to induced changes in pattern of land use, population density, or growth rate. *Id.* Conversely, cumulative effects are the

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incremental impacts of a proposed action when added to other past, present, and reasonably foreseeable future actions, regardless of which agency, person, or entity initiates the action. 40 C.F.R. § 1508.7. Cumulative effects may result from individually minor but collectively significant actions that take place over a period of time. *Id.*

When Reclamation considered whether the impacts resulting from the project are "significant," it was required to consider both the "context" and the "intensity" of the impacts. 40 C.F.R. §§ 1508.27(a) and (b). The term "context" means that impacts of the proposal must be considered in light of its specific location, the affected region, and society as a whole. *Id.* "Intensity" refers to the magnitude of the project's impacts on the environment. *Id.* In determining the intensity of the impacts of the M&I Shortage Policy on the environment, Reclamation must consider: environmentally beneficial actions, public health, unique characteristics of the project site, degree of controversy surrounding the project, degree of unique or unknown risk, precedent setting effect, cumulative effect, cultural or historical resources, special status species, and consistency with federal, state or local laws. *Id.* The Draft M&I EA may not satisfy these requirements.

#### 1. Impacts To The Water Supply.

The analysis of the M&I shortage Policy's impacts on the water supply is confusing, and it is therefore difficult to determine the extent of the impact of the M&I Shortage Policy on Westlands' water supply. The analysis in the Draft M&I EA clearly identifies the impacts of the M&I Shortage Policy in very dry years, when Westlands will be receiving less than 25% of its historical use. However, it does not clearly indicate the extent of the M&I Shortage Policy's impacts in all other years. As Westlands and the other agricultural water contractors will be receiving less water in any year that there is insufficient water to provide all contractors with 100% of their supplies, the extent of the total reduction should be clearly identified in the M&I EA.

Besides the shortcomings identified above, the Draft M&I EA is also inconsistent when it refers to the extent of the possible water supply impacts. The Draft M&I EA is not entirely accurate when it states that the alternatives will "result in changes in CVP contract" in 9 of the 72 years modeled, which is a statement that is made in multiple locations throughout the Draft M&I EA. *See e.g.* Draft M&I EA at p. 5-45. The alternatives will result in changes in the CVP contracts in more than merely nine years. Table 5-14 shows that agricultural water deliveries will in fact be less than 25 percent in 13 years out of the 72 years modeled under every alternative. Draft M&I EA at p. 5-44. Moreover, the impacts of the alternatives are greater or less than the No Action Alternative in each of the thirteen years, to a greater or lesser extent depending on the alternative. *Id.* Therefore, the Draft M&I EA should be modified to present a more consistent and accurate portrayal of the M&I Shortage Policy's impacts.

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## 2. Impacts To Groundwater, Air Quality And Soil Resources.

The Draft M&I EA's analysis of the M&I shortage Policy's potential impacts on groundwater, air quality and soil resources appears internally inconsistent. For example, in the groundwater section, it states that "some contractors may fallow land more frequently" as a result of the reduced agricultural contractor's water allocation. Draft M&I EA at p. 5-31. In the same document, however, the air quality and the soils sections state that "it is not anticipated that additional lands would be fallowed due to changes in the allocations of Irrigation CVP water service contracts." Draft M&I EA at p. 5-94. *See also*, Draft M&I EA at p. 5-97-5-98. The aforementioned statements are clearly inconsistent.

The Draft M&I EA appears to contradict itself again in the soil section. In that section, it concludes, without any analysis, that "[t]hese alternatives would not result in cumulative adverse impacts to soils *when considered in combination with future projects such as water transfer projects* or development of other water supplies." Draft M&I EA at p. 5-98 (emphasis added). This statement directly contradicts the statement in the air quality section where the Draft M&I EA defers the cumulative impacts analysis of future water transfer projects on air quality. Draft M&I EA at p. 5-94. These statements are contradictory because a cumulative impacts analysis of the combined effects of future water transfer projects and the M&I Shortage Policy on soil erosion would have to address air quality, because soil erosion (i.e., dust) is the cause of the reduced air quality in this circumstance.

### D. The Assumptions Regarding the Amount of Health And Safety Water That Will Be Required Is Questionable.

Since the actual health and safety needs of the M&I contractors has not been determined, the Draft M&I EA assumes for purposes of the analysis that the health and safety allocations for "industry" and "commercial enterprises" will be 80% and 90% respectively. The Draft M&I EA justifies these high percentages by reasoning that water reductions below these levels could cause financial impacts. Draft M&I EA at p. 3-6. However, the resulting financial impacts from further reductions does not seem to be a "health and safety" issue, no more than the financial impacts to the farmers and ranchers impacted by a drought is a health and safety issue. Perhaps Reclamation should consider the approach adopted by the California Water Code. When a "water shortage emergency" is declared pursuant to the Water Code, first priority is given to domestic uses, sanitation and fire protection. Cal Water Code § 354. Financial interests are given a secondary priority. The Water Code's approach appears appropriate as it more directly addresses actual health and safety issues. For this reason, Reclamation should reconsider its criteria for defining minimum health and safety water requirements, particularly since each urban contractor will be determining its own health and safety requirements, which means there will be inconsistent implementation of the policy unless clear guidance is provided.

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Your consideration of these comments is appreciated. If you have any questions, please call Jon D. Rubin or me at (916)321-4500.

Very truly yours,

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD

*Becky Sheehan*

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**FACSIMILE TRANSMISSION****DATE:** April 22, 2005**TO:**

NAME	FAX NO.	PHONE NO.
David Lewis Bureau of Reclamation	916-978-5094	

**FROM:** Becky Dell Sheehan **PHONE:** 321-4500**RE:** Comments Regarding M&I Shortage Policy Draft EA

FILE NUMBER:	2010.4	USER ID:	99662
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**MESSAGE:**

See Attached Letter

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